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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 747.

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY and BOGGS COLD STORAGE COMPANY,
Petitioners,

vs.

SOUTHERN RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY and GEORGIA INDUSTRIAL REALTY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Respondents in Opposition to Petition for Certiorari.

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BRIEF

For Respondents in Opposition to Petition for Certiorari.

Respondents, Southern Railway Company, The Alabama Great Southern Railroad Company and Georgia Industrial Realty Company, respectfully submit that the petition for writ of certiorari should be denied.

SUMMARY STATEMENT OF REASONS FOR DENIAL OF THE WRIT.

The petition should be denied for the reason that it involves no questions of importance under the Interstate Commerce Act or other issues deserving the attention of this Court but is merely an attempt to have the Court review the weight of the evidence in a voluminous record of a jury trial in three damage suits which resulted in verdicts and judgments against the petitioners, plaintiffs in the actions. The District Court overruled motions for judgment notwithstanding the verdict and for new trial, and the judgment was affirmed by the Fifth Circuit, 288 F. 2d 759, and reaffirmed on petition for rehearing, 294 F. 2d 850.

A review by this Court would merely involve review of the determinations of fact underlying the verdict and the affirmance below, and it is well settled that certiorari is not to be granted merely to review the evidence or inferences drawn from it.

PETITIONERS' STATEMENT OF "QUESTIONS INVOLVED" IS INCORRECT.

The petition (pp. 2-3) presents as "questions involved" several propositions of law which are in no way issues in these cases.

1. a. and 1. c. No question is involved as to whether or not a railroad can "lease non-transportation facilities to shippers at rents which are less than compensatory and less than prevailing market rents for such facilities" or "furnish working capital to shippers by permitting them to occupy railroad-owned facilities for extended periods of time without paying compensatory rents at least equal to prevailing market rents." On the contrary, the Dis-

trict Judge, at the petitioners' request, charged the jury that a railroad can do neither legally, and the jury found for the defendants.

1 b. Nor is there any question directly involved as to whether a railroad can "guarantee shipper obligations" for the purchase of warehouse property from the railroad. This question of law was indirectly raised below as bearing upon an alternative justification of the level of rents charged by the railroad. Furthermore, it is submitted that there can be no substantial argument against the right of a railroad to guarantee purchase obligations of potential shippers for the purpose of controlling the use of the property.

2. Finally, there is no substantial question involved here as to the "binding" effect of a decision of the Interstate Commerce Commission, rendered after the trial and verdict in this case, in a wholly independent proceeding.

The only question involved in these cases is whether or not the evidence is sufficient to support the jury verdicts, certainly no basis for review by this Court.

ARGUMENT.

A.

The basic provision of the Interstate Commerce Act on which the petitioners' entire case is rested, both below and in this Court, is the prohibition against discrimination by carriers in furnishing transportation facilities, 49 U. S. C. § 6 (7). Although petitioners make a long and involved tale of the matter, the factual issues involved were really fairly simple and were resolved against petitioners by the jury and the courts below. Petitioners as warehousemen complained that the provisions of leases by the respondent Southern Railway Company of warehouses constructed by it on its property to competitors of petitioners constituted unlawful discrimination. Petitioners also claimed that the railroad did not fulfill its statutory obligation with respect to timely collection of rents from the tenants.

The respondents took the position below, and still insist, that the case should never have been submitted to the jury because, as a matter of law, petitioners failed to prove any discrimination in relation to transportation. Both courts below decided against respondents and in favor of petitioners on this issue—the pre-eminent question of law both in the trial court and on appeal—and resolved whatever doubts they had in the matter in favor of petitioners by giving them an unprecedented standing to maintain an action for damages under the circumstances presented by this record. As the Court of Appeals pointed out, in all the 75 years since the enactment of the Interstate Commerce Act:

> "Pittwood v. Northern Pacific Ry. Co., 1918, 51 I. C. C. 535, is the only decision passing on the validity

> of a warehouseman's claim for damages against a railroad for an injury allegedly caused by an unjust discrimination." (288 F. 2d at 767, Petitioners' Appendix, p. 18.)

The *Pittwood* case held that there was no right of action by the warehouse owner. The trial court held, however, as a matter of law, that the petitioners, as operators of competing warehouses, did have a right to maintain such an action, and the cases were submitted to the jury on that basis. The Court of Appeals chose, on this question, "to err, if it be error" (288 F. 2d at 771, Petitioners' Appendix, p. 27) in favor of the petitioners, and on rehearing, held the question to be "essentially a factual one or a mixed question of fact and law" but stated that "appellants have no cause for complaint," since the issue was not submitted to the jury (294 F. 2d at 853, Petitioners' Appendix, p. 49).

Thus the courts below did not hold as a matter of law, as petitioners assert in their first "question involved," that a railroad could "lease non-transportation facilities to shippers at rents which are less than compensatory and less than prevailing market rates for such facilities." On the contrary, as the court below pointed out (288 F. 2d at 762, Petitioners' Appendix, p. 7), this was the very proposition of law on which it was submitted to the jury by the District Court on Petitioners' theory:

> "Was the rent charged to the tenants of the Birmingham Food Terminal a fair rental, in view of all the circumstances, a fair market rental, or was it less than the fair market rental, or was it less than a compensatory rental?
>
> "If you decide that it was a fair market rental and that it was a compensatory rental, then there would be a second question because the plaintiff is saying

in each case that if it is conceded that the rental was a fair market rental or a compensatory rental, the railroad was guilty of unlawfully extending its credit to the tenants by failing to use due diligence in collecting the rent."

B.

Nor is the petitioners' second question under the Interstate Commerce Act, namely, whether a railroad can "guarantee shipper obligations in order to enable the shippers to obtain long term financing . . ." (Petition, p. 3) really involved in this case. In the first place, such an arrangement in connection with a sale of railroad property is perfectly legal, and no authorities are cited to the contrary. Secondly, even if the argument had any validity, that so-called issue is involved only indirectly and remotely, since the contingent undertaking by the respondents to assist in the financing by shippers of the construction or purchase of warehouses through the guarantees of second mortgages never was carried out. As a commitment for the future only, it was held by the courts below to be a proper element for consideration, in the alternative, by the jury in determining the rent level as affected by the element of depreciation (288 F. 2d at 773, Petitioners' Appendix, p. 32).

Furthermore, the statement in the petition (p. 9) that the three-judge court, in sustaining the Commission order, held the *original sales plan illegal* is not correct. That court said only that on the record before it the Commission could find that the *rent* plan (formula omitting depreciation) was "the equivalent of an agreement by the railroad to postpone part of the rent to a future date, resulting in an unlawful loan or extension of credit . . ." (186 F. Supp. at 38, Petitioners' Appendix, p. 76).

Contrary to the petitioners' assertion, the court noted, "However, the Commission refused to rule on the validity of the sale plan because it considered that such action would be 'manifestly premature,' 308 I.C.C. at 616" (186 F. Supp. at 41, n. 7, Petitioners' Appendix, p. 82).

C.

There is no inconsistency whatever between the decisions and judgment below and the so-called "credit extension cases" (Petition, p. 11). Much is sought to be made of the argument that depreciation "costs" were excluded from rent. This argument was rejected by the jury, and by both courts below, for several good reasons. So far as this Court is concerned, it is sufficient that there was evidence from which the jury could find that the basis of the rent charged was adequate to include depreciation and still constitute compensatory rent and not less than fair market rent.[1] The charge on the level of rent as given to the jury was, as the Court of Appeals pointed out, in terms requested by petitioners, and required a finding that the rent would constitute a "fair return" (288 F. 2d at 773, Petitioners' Appendix, pp. 32-33). The Court of Appeals held there was substantial evidence to support the verdict.

The addition by the District Court to the charge as requested by plaintiffs, to the effect that depreciation might properly be eliminated if the jury found that the parties intended to carry out the original purchase plan, was sound but was not essential to the verdict, as it merely gave an

[1] The Court of Appeals said as to this:

"This Court must assume that if the jury found it necessary to consider depreciation, it found that the rents were not only at the market value but yielded a 'compensatory return.'" (288 F. 2d at 772, Petitioners' Appendix, p. 30)

alternative basis for the verdict on this aspect. There was ample evidence to support a finding by the jury that, even including depreciation, the rent level was adequate.

D.

Nor did the court below hold (and respondents did not then and do not now contend) that there is any right on the part of the railroad to "furnish working capital to shippers by permitting them to occupy railroad-owned facilities for extended periods of time without paying compensatory rents at least equal to prevailing market rents" (Petition, p. 3).

However, it cannot seriously be contended that a railroad is under an absolute obligation to collect all rents on all facilities furnished without regard to circumstances, and no court or commission has ever so held, although that appears to be the position now asserted by petitioners (Petition, pp. 17-19).

As the court below said on the issue, construing Section 3 (1) of the Interstate Commerce Act (49 U. S. C. § 3 (1)):

> "The statutory test, however, is one of reasonableness. The Act condemns 'undue or unreasonable' concessions.
>
> "In view of the language of the statute prohibiting *undue* concessions, the charge properly instructed the jury to consider whether the defendants exercised *due* diligence in collecting the rent. Appellants do not suggest, here or in their requested charges, that the law imposed a higher degree of duty on the carrier" (288 F. 2d at 774, Petitioners' Appendix, pp. 33-35).

E.

Nor is the additional and contingent "question presented" advanced in footnote 4 on p. 10 of the petition a correct statement of any issue or possible issue in the case. It is clear that the District Judge fairly and clearly instructed the jury in the trial which had been set, first on the issue of liability only, without objection by plaintiffs, that the plaintiffs' only burden of proof as to damages at that stage was that they had sustained *some* injury which was capable of evaluation in money.

The charge was favorable to plaintiffs and indeed relieved them of what defendants believe to be a burden of proof as to causation and damages which plaintiffs could not have met.

F.

Thus, the petition merely seeks to have this Court review the record already thoroughly canvassed by the two courts below and overturn the jury's findings of fact on issues submitted basically on the petitioners' theory of the law. This is clearly indicated by petitioners' labored and argumentative footnoting of the opinions of the court below. (See Petitioners' Appendix.)

All the so-called "questions involved" under the Interstate Commerce Act are merely attempts to have this Court review the record of the jury trial, not from the standpoint of the propriety of the trial court's instructions, which were substantially favorable to petitioners, but as to the sufficiency of the evidence to support the verdict. All aspects of the trial have been thoroughly reviewed by the two courts below and properly disposed of by them. Certiorari should not now be granted merely to

review the evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178 (1938).

G.

The petitioners, having filed and vigorously pressed these cases to trial while a related proceeding filed by them in the Interstate Commerce Commission was pending and having lost in the trial court, argued for the first time in the Court of Appeals, and now argue here that these cases should be reversed solely because of an allegedly inconsistent Commission decision, rendered after the trial and judgment in the District Court, on the ground that "conflicts with primary jurisdiction cases" are involved.

These are not proper cases for the application of the doctrine of primary jurisdiction, and even if they were, the petitioners have waived their contention that the primary jurisdiction doctrine is applicable and are now estopped to raise that contention in this Court.

Petitioners insisted in the District Court that the fact questions in these damage suits, the only issues involved, are plainly not the type that call for exercise of the expertise of the Interstate Commerce Commission, and that, indeed they are questions which a court and jury in Birmingham, Alabama, are particularly well qualified to determine, i. e., fair rental value in Birmingham and the reasonableness or due diligence of the railroad in collecting rent in the light of all the circumstances. As petitioner Birmingham Ice and Cold Storage Company said in its brief in the trial court on motion to dismiss, (p. 16),

> "The interpretation of the contracts and agreements incidental to the factual determination of what the dealing of the parties have been are determinations

as to which this Court is eminently experienced to make."

Furthermore, these cases do not present a situation which in any respect calls for uniformity of interpretation and enforcement by the Commission. Certainly the fair market value of a parcel of rental real estate, and the due diligence exercised by a railroad in the collection of rents in a particular situation will depend altogether on the facts of the case and cannot establish criteria for other fact situations. This case is wholly dissimilar from the familiar reasonable rate cases such as *A. B. Phillips Co. v. Grand Trunk W. Ry.*, 236 U. S. 662 (1915) and *National Pole Co. v. Chicago & N. W. Ry.*, 211 Fed. 65 (7th Cir. 1914), cited in the petition (p. 20). *Mitchell Coal & Coke Co. v. Pennsylvania RR.*, 230 U. S. 247 (1913), and *United States v. Western Pac. RR.*, 352 U. S. 59 (1956), also cited by petitioners (petition, p. 20), both involved the interpretation of highly technical tariff provisions, obviously matters requiring the exercise of Commission expertise and uniformity of interpretation and application.

Although we firmly deny that the doctrine of primary jurisdiction has any application to these cases, we submit that, even accepting the applicability of that doctrine for the purpose of argument, the petitioners have long since waived any right to raise this question and are now estopped to do so. In July 1957 petitioner Shaw Warehouse Company filed a complaint with the Interstate Commerce Commission, requesting orders prohibiting the respondents Southern Railway Company and Georgia Industrial Realty Company from alleged discriminatory practices. In January 1958 petitioner Birmingham Ice and Cold Storage Company intervened in the Commission proceeding, and in February 1958 petitioner Boggs Cold Storage Company intervened. Although reparations could have been sought in the Commission proceeding under

Section 9 of the Interstate Commerce Act, 49 U. S. C. § 9, none of the three petitioners asked for reparations. Shaw Warehouse Company did state in its original complaint that it was filed pursuant to Section 9, but this was deleted by an amended complaint.

In March 1958 Shaw Warehouse Company and Birmingham Ice and Cold Storage Company filed their suits here on appeal, and Boggs Cold Storage Company filed its suit in June 1958. The defendants (respondents here) promptly moved to dismiss the cases below, or in the alternative for a stay of trial, on the ground, among others, of the pendency of the Commission proceeding. The petitioners objected to either dismissal or stay, insisting that they had the clear right of election under Section 9 of the Interstate Commerce Act to seek damages in the courts, independently of the Commission proceedings.[2]

In the reply brief of petitioner Birmingham Ice and Cold Storage Company in the trial court on motion to dismiss (which brief was joined in and adopted by petitioner Shaw Warehouse Company), it was stated that:

> "This case presents only non-transportation problems which certainly could be decided by the Commission, but as to which decision by the Commission

[2] In their Appendix (p. 2) the petitioners omitted the parts of Section 9 which provide for an election of remedies. The first sentence of that section, *in full*, reads as follows:

> "That any person or persons claiming to be damaged by any common carrier subject to the provision of this part *may either make complaint to the Commission as hereinafter provided for*, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; *but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.*" (Emphasis supplied to indicate omitted parts.)

is not essential. These problems are confined to the interpretation of contracts and the determination of values of local real estate. On these issues the plaintiff submits that the 'expertise' of this court, if not superior, is at least equal to that of the Commission" (Brief, p. 3).

"Can it be said that the administrative agency is peculiarly able to determine the questions here? The plaintiff repeats the resounding 'No' of its original memorandum. The private contracts and agreements of the defendants are indeed peculiarly suited for interpretation by this Court as the defendants themselves have admitted in Action Nos. 8966 and 9080 in which they have themselves asked this Court to interpret those very agreements. Whether those agreements provide for the sale and rental of real estate in Birmingham, Alabama, at less than cost and on less than fair market terms is an issue which is indeed more peculiarly suited for a court in the area where the real estate is situated than any other body, administrative or judicial, anywhere" (id., p. 8).

"The issue defendants raise by inference without arguing it precisely is that of concurrent jurisdiction. Plaintiff freely admits that this claim for damages could be submitted by it to the Commission without jury trial. But it prefers a trial in this Court and is clearly entitled to it.

"Likewise, the plaintiff is entitled to ask the Commission for protection in the future from a continuation of the defendant's unlawful conduct.

"The situation is not unlike that which commonly arises where an injured party is entitled to several

different types of relief available to him in different forms. An employer may be entitled to a cease and desist order from the National Labor Relations Board and to damages from a court of law because of a union's course of conduct as pointed out by Mr. Jaffe in the article cited by defendants. (See 102 U. Pa. L. Rev. 578.) If both remedies are sought should the situation be any different from that in which only damages are sought? See *Pennsylvania R. Co. v. International Coal Min. Co.*, supra" (id., pp. 10-11).

"Here the parties are not the same: in fact, the Bureau of Inquiry and Compliance of the Commission is a party by intervention in the *Shaw* proceeding. The rights asserted and the objects are not the same; in the *Shaw* proceeding injunctive type relief is sought; in this action damages are the object of relief.

"In this light, we earnestly submit that the matters raised by defendants are for the discretion of the Court. . . . The defendants have not shown just reason for the exceptional procedure they impliedly ask and the Court should therefore allow the case to take its normal course in proceeding to trial" (id., p. 12).

The motions to dismiss or, in the alternative, to stay were overruled at the insistence of petitioners. In July 1958 the examiner's report in the Commission proceeding was handed down, and, even though it favored on some propositions the position taken in the proceeding by these petitioners, they, apparently fearing that the Commission might not accept the examiner's report, continued to press for the trial of their damage suits. The damage suits were tried in May 1959, resulting in judgments against the plaintiffs, and appeals to the Court of Appeals were filed in August 1959. In October 1959 the Commission report

came down, but even then the plaintiffs were afraid to rely on it. Although they went so far as to attach a copy of the entire report of the Commission as an exhibit to their brief in the Court of Appeals and to attempt to use the findings of fact in that decision to supply the deficiencies in the record in the damage suits, they did not argue that the Commission's decision should be controlling. They simply suggested weakly that the decision "should be given special weight" and that "it is entitled to great weight in the decision and treatment of the issue involved." They did not state whether or not this "great weight" was to be given to the decision as to law or to fact, or to both. The Court of Appeals in the opinion on rehearing (294 F. 2d at 852, Petitioners' Appendix, p. 47) acknowledged that the opinion of the Commission and that of the three-judge court had been given "great weight" in the consideration of the appeals.

Even in their petition for rehearing in the Court of Appeals, which was after the time had expired for appeal of the decision of the three-judge court and there was no longer any question that the decision of the Commission was final, the petitioners hesitated to raise the question of primary jurisdiction. In that petition they simply said that: "deference to the Commission's determination is necessary." The first mention of "primary jurisdiction" on these appeals was by Judge Brown in his dissent in the opinion on rehearing (294 F. 2d at 858, Petitioners' Appendix, p. 60).

It should be noted that Judge Lynne, who tried these cases, spoke for the three-judge court (which also included Court of Appeals Judges Tuttle and Rives) and found no inconsistency between the Commission's decision and order and the validity and judgment in these cases. Nor did Judges Hutcheson and Wisdom of the Court of Appeals find any such inconsistency. The petitioners' petition for

rehearing "in banc" in the Court of Appeals, addressed to "all the active Circuit Judges," was denied.

In view of the petitioners' successful insistence throughout the District Court stages of these cases that it should proceed without regard to the pendency of the Commission proceeding, even if there were otherwise any merit in the contention that the Commission decision rather than the prior verdicts and judgments in the District Court should be the controlling judgment (which on its face seems to be the reverse of a fair and proper rule), petitioners are now estopped to assert any such position. There is no necessary inconsistency between the decision of the Commission and the judgments below, as the Court of Appeals and the three-judge court held. The issues and relief sought in the two proceedings were not the same, the parties were not the same, the witnesses and evidence were different. Even if there were necessary inconsistency, the situation is of petitioners' own making, and we do not believe that judicial process should be made a tool in any such game of cat and mouse.

II.

Finally the petitioners made the farfetched suggestion that the decision of the Court of Appeals "will convert every effort of an injured party to enforce his clear statutory right under Sections 8 and 9 into an opportunity for the offending railroad to mount an otherwise unavailable collateral attack on the Interstate Commerce Commission decisions" (Petition, p. 22). Just how this will result is difficult to comprehend. The railroad in this case has mounted no attacks; the attacks have been mounted by the petitioners. They chose to divide their forces and to attack from two directions, through the Commission and through the courts, although they could have con-

centrated their efforts in the Commission alone, seeking there both injunctive relief and damages, 49 U. S. C., § 9. The fact that one of their attacks has failed, even though the other has succeeded in part, does not constitute a "collateral attack" on the Commission order.[1] That there is no legal inconsistency in two fact-finding bodies' reaching differing conclusions on different records in the determination of different issues is well stated in *United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F. 2d 637, 642-3 (6th Cir.); *cert. denied*, 344 U. S. 897 (1952); *reh. denied*, 344 U. S. 919 (1953), where the court said:

> "We recognize that this finding is contrary to the finding in the companion case of N. L. R. B. v. Deena Artware, Inc., . . . [198 F. 2d 645 (6th Cir. 1952)] in which the Trial Examiner found that the picketing of the area of construction which caused the cessation of work by the general contractors was on the part of the Teamster's Union and not by the Appellants, which finding we have upheld and on which we have based a ruling in that case. Under our existing system of courts, juries, administrative agencies, and appellate review, such findings, even though inconsistent, are not invalid, and one does not destroy the other. The two proceedings, even though arising out of the same labor dispute, were heard by separate fact finding agencies. The witnesses in the two proceedings were not the same. The cross-examination of some witnesses who testified in both proceedings was not by the same attorneys. Necessarily, the evidence produced in the different proceedings by such

[1] The Commission decision in fact was favorable to respondents on the questions of fair market value of land, demolition cost of buildings on the land prior to construction of the new terminal facilities and other fact issues, but respondents were, at petitioners' insistence, forced to retry these issues to the jury and risk a contrary unfavorable jury determination.

testimony was not identical. Each fact finding agency was entitled to make its own decision upon the evidence before it. Though this Court on review recognizes the inconsistency, and may not be in accord with one of the two rulings if it was making the ruling as a matter of original jurisdiction, it does not have the right to set aside such ruling, . . . a case of the jury verdict, if it is supported by substantial evidence, or, in the case of the Labor Board proceeding, if it is supported by substantial evidence on the record considered as a whole. In our opinion, the respective findings are so supported in each of the two proceedings."

CONCLUSION.

Petitioners began this series of attacks against the competition at the Birmingham Food Terminal in July 1957. The Commission, on petitioners' complaint and after hearings and arguments extended over a period of about three years, entered orders fixing a floor on the rents which the respondents are obliged to charge and requiring them to collect these rents. The United States has filed suit to enforce collection of the rents; as have respondents, and the tenants in turn have sought declaratory judgment as to their obligations. The petitioners, Shaw Warehouse Company and Birmingham Ice and Cold Storage Company, have intervened in the suit filed by the United States. All these actions have been consolidated and are set for trial before Judge Lynne in April 1962 (Petitioners' Appendix, p. 86). Having sat on the three-judge court, and having tried the cases below, Judge Lynne is perfectly able to resolve any possible ambiguities and unsettled questions in the public interest. The damage suits here sought to be reviewed were tried exhaustively in 1959 and considered by the Court of Appeals originally and on rehearing for

more than a year. This Court is now asked to review the evidence and reverse and revive these damage suits. We submit that there is no longer any live issue in these cases and the petition should be denied.

Respectfully submitted,

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Certificate of Service

I, Jos. F. Johnston, one of the attorneys for Southern Railway Company, The Alabama Great Southern Railroad Company and Georgia Industrial Realty Company, respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1962, I served copies of the foregoing brief for respondents in opposition to petition for certiorari on the petitioners, Shaw Warehouse Company and Boggs Cold Storage Company, by mailing copies in duly addressed

envelopes, with first-class postage prepaid (first-class air mail postage prepaid in the case of Mr. Layne) to the attorneys of record for such petitioners as follows:

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I further certify that on the ..... day of March, 1962, I served copies of the foregoing brief of respondents in opposition to petition for certiorari on the petitioner, Birmingham Ice and Cold Storage Company, by mailing copies in a duly addressed envelope, with first-class postage prepaid, to the attorneys of record for such petitioner as follows:

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